Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

OPERATING ENGINEERS PENSION TRUST, OPERATING ENGINEERS HEALTH & WELFARE FUND, OPERATING ENGINEERS VACATION-HOLIDAY SAVINGS TRUST, and OPERATING ENGINEERS TRAINING TRUST,
Petitioners,

vs.

INSURANCE COMPANY OF THE WEST,
Respondent.

Petition For Writ Of Certiorari To The Court Of Appeal, Second Appellate District, Division Three, Of The State Of California

PETITION FOR WRIT OF CERTIORARI

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39 pp

QUESTION PRESENTED

Does Section 514(a) of the Employee Retirement Income Security Act of 1974, as amended in 1980 ("ERISA"), preempt an employee benefit plan's state law action filed against an insurance company to enforce private surety bonds issued to assure an employer's payment and performance on construction projects as a means to collect delinquent employer contributions owed to the plan?

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INSURANCE COMPANY OF THE WEST,
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Petition For Writ Of Certiorari To The Court Of Appeal, Second Appellate District, Division Three, Of The State Of California

---

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners Operating Engineers Pension Trust, Operating Health and Welfare Fund, Operating Engineers Vacation-Holiday Savings Trust, and Operating Engineers Training Trust respectfully pray that a Writ of Certiorari issue to review the decision of the Court of Appeal, Second Appellate District, Division Three, of the State of California filed May 25, 1995, in Civil No. B077217 of that Court.

OPINIONS BELOW

The Opinion of the Court of Appeal is officially reported at 35 Cal.App.4th 59, 42 Cal.Rptr.2d 1 and appears in the appendix at pp. la-12a. The Order of the Supreme Court of California filed August 9, 1995, denying petitioners' petition for review is officially reported at ____ Cal.4th ____, and appears in the appendix at p. 13a. The order granting summary judgment in favor of defendant filed June 7, 1993, in the Superior Court of California is not officially reported, and appears in the appendix at pp. 14a-17a.

JURISDICTION

The decision of the Court of Appeal was filed on May 25, 1995. The order of the Supreme Court of California denying discretionary review was filed on August 9, 1995. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a).

CONSTITUTION AND STATUTES INVOLVED

The Supremacy Clause of the Constitution; Section 514(a) and (c) of ERISA, 29 U.S.C. § 1144(a), (c), 88 Stat. 897; Section 515 of ERISA, 29 U.S.C. § 1145, 94 Stat. 1295; and California Civil Code § 1559 are set forth in the appendix at pp. 18a-19a.

STATEMENT OF THE CASE

Petitioners Operating Engineers Pension Trust, *et al.* (the "Trusts"), are multiemployer employee benefit plans which receive employer contributions as provided by collective bargaining agreements in the construction industry of California and Nevada. A general contractor, William Kirchnavy Construction, Inc. ("Kirchnavy"), failed to pay contributions to the Trusts on behalf of its employees on certain construction projects. When the Trusts found

Kirchnavy unable to pay the obligated contributions, the Trusts filed an action in the Superior Court of Los Angeles County seeking to enforce claims against certain surety bonds issued by respondent Insurance Company of the West ("ICW") on behalf of Kirchnavy, as principal, on six construction projects in California.

The Superior Court granted summary judgment in favor of ICW against the Trusts on grounds that state law claims by the Trusts as third party beneficiaries of the surety bonds are preempted by Section 514(a) of ERISA. The Court of Appeal affirmed on grounds that the Trusts' third party beneficiary claims are preempted by Section 514(a) because such claims brought under Civil Code § 1559 would supplement the remedy provided by ERISA. The Court of Appeal ruled that the remedy afforded by § 515 of ERISA against the delinquent employer was intended by Congress to be exclusive and the only means available to employee benefit plans to collect delinquent contributions, citing *Carpenters Health & Welfare Trust Fund v. Tri Capital Corporation*, 25 F.3d 849 (9th Cir. 1994) *cert. denied* ____ U.S. ____, 115 S.Ct. 580, and *Carpenters So. California Administrative Corp. v. El Capitan Development Co.* (1991) 53 Cal.3d 1041, 282 Cal.Rptr. 277 *cert. denied* ____ U.S. ____, 112 S.Ct. 430. The Supreme Court of California denied a petition for review, with Justice Mosk voting to grant review.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION PRESENTS THIS COURT THE OPPORTUNITY TO CONSIDER, FOR THE FIRST TIME, THE PREEMPTIVE INTENT OF ERISA WITH RESPECT TO STATE LAW CLAIMS BY EMPLOYEE BENEFIT PLANS TO RECOVER DELINQUENT EMPLOYER CONTRIBUTIONS FROM THIRD PARTIES OTHER THAN EMPLOYERS.

This Court has repeatedly reviewed and announced interpretive rulings of the scope of ERISA preemption of state law claims *against* employee benefit plans by plan participants, beneficiaries and various third parties. See, *e.g.*, *Pilot Life Insurance Company v. Dedeaux* (1987) 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 [state law claims by beneficiary against employee benefit plan for mishandling benefits]; and, *Mackey v. Lanier Collection Agency* (1988) 486 U.S. 825, 108 S.Ct. 2182, 100 L.Ed.2d 836 [third party levy of execution against assets of employee benefit plan to satisfy judgment owed by plan participant]. However, despite the multitude of ERISA preemption cases dealing with claims *against* employee benefit plans and relating to the administration of such plans, this Court has not reviewed and decided a single case illuminating the effect of ERISA's preemption clause on state law claims filed *by* employee benefit plans *against other parties* seeking to recover employer contributions or other amounts owed to the plans.

This Court's explication of ERISA's preemptive effect on state law claims brought by employee benefit plans against parties other than employers, particularly such claims seeking to collect delinquent employer contributions, is urgently needed. ERISA was amended in 1980 to add a federal statutory cause of action by employee benefit plans to recover delinquent contributions and other amounts from

the delinquent employer. The preemptive effect of ERISA on state law with respect to such federal actions against delinquent employers is properly determined by reviewing congressional intent in 1980 when that federal cause of action against the employer was enacted. Nevertheless, absent a decision by this Court construing the 1980 preemptive intent, many lower courts have sought guidance on this distinctive issue from the decisions of this Court interpreting the preemptive intent of the 1974 enactment. Consequently, many lower court decisions addressing this subject are confused, misguided and erroneous with respect to the relevant congressional intent. Indeed, the decisions of the lower courts are in conflict and, specifically, the line of cases leading to the decision of the Court of Appeal below is erroneous. Accordingly, this Court's review and guidance is needed at the earliest possible date to curtail monetary losses presently being experienced by employee benefit plans in the range of millions of dollars annually.

II.

THE DECISIONS OF THE STATE AND FEDERAL COURTS ARE IN CONFLICT ON THIS IMPORTANT FEDERAL QUESTION.

The highest court of the State of New York first addressed the contention that a state law which aids an employee benefit plan in the collection of delinquent employer contributions is preempted by § 514(a) of ERISA. In *Sasso v. Vachris* (N.Y. 1985) 66 N.Y.2d 28, 484 N.E.2d 1359, the New York Court considered whether an employee benefit plan governed by ERISA could rely upon a state statute in imposing personal liability on shareholders of corporate employers which failed to pay contributions owed to the plan. Guided by this Court's rulings that state law is presumed not to have been preempted by federal statute in the absence of persuasive evidence to the contrary, and

acknowledging that the "task in deciding this preemption question is to ascertain and give effect to the congressional intent embodied in the Federal Statute at issue . . . ," 484 N.E.2d at 1362, the New York court properly concluded without hesitation that the state statute in question was *not* preempted by ERISA. In part, the New York court reasoned that the state statute imposing joint and several liability on defendants regulates the employer only, and does not attempt to regulate the content of the employee benefit plan. *Id.*, 484 N.E.2d at 1363. *Cf.*, ERISA § 514(c)(2). More importantly, the New York court discerned congressional intent by analyzing the legislative history of the 1980 amendments to ERISA, which added specific provisions dealing with delinquent contributions. First, the court recognized that ERISA as originally enacted in 1974 contained no provision dealing with employer delinquent contributions, but created causes of action by fiduciaries only for equitable relief to enforce the statute or the terms of the employee benefit plan. *Ibid.* Second, the court noted that the 1980 amendments to ERISA indicate no intent on the part of Congress to preempt existing state remedies. *Ibid.* Finally, the New York court ruled as follows:

> "[T]he relevant legislative history of these [1980] amendments evince a specific congressional intent that ERISA's civil remedies merely supplement, rather than supercede, existing State remedies . . . , at least insofar as they provide for the collection of delinquent employer contributions to employee benefit plans (citations omitted.)" *Id.* 484 N.E.2d at 1364.

At this point in the opinion, *Sasso* notes and quotes from the legislative history of the 1980 amendments to ERISA, lending its own emphasis to the statement, as follows:

> "*The [legislation] does not change any other type of remedy permitted under State or Federal law with*

respect to delinquent multiemplover plan contributions." Citing 126 Cong.Rec. at 20202. *Ibid.*

Other more recent state court decisions have similarly concluded that state law remedies are available to employee benefit plans to collect delinquent employer contributions from third parties. *Plumbers Local 458 v. Howard Immel, Inc.* (Wis.App. 1989) 151 Wis.2d 233, 445 N.W.2d 43 [employee benefit plan action to collect delinquent employer contributions through state law action to enforce construction lien law is *not preempted* by ERISA]; *Seaboard Surety Company v. Indiana State District Council of Laborers and Hod Carriers Health and Welfare Fund* (Ind.App. 1995) ____ Ind.2d ____, 645 N.E.2d 1121 [employee benefit plan action to recover delinquent employer contributions through state law action to enforce surety bonds issued on construction project is *not preempted* by ERISA, noting that the U. S. Supreme Court "has never held that a state law providing a plan with supplemental remedies was preempted by ERISA"].

Likewise, the U. S. Court of Appeals for the Third Circuit recently ruled that ERISA does not preempt a state law claim by employee benefit plans to collect delinquent employer contributions against surety bonds issued to assure payment of labor and materials on construction projects. *Ragan v. Tri-County Excavating, Inc.* (3rd Cir. 1995) ____ F.3d ____, ____ [action by employee benefit plans as common law third party beneficiaries of surety bonds does not "relate to" the plans, nor is a surety an "employer" against whom ERISA's remedy is intended to be exclusive].

By contrast, the decision of the California Court of Appeal below holds that the Trusts' state law claims as third party beneficiaries of private surety bonds are preempted by ERISA because ERISA's cause of action against the employer is intended to be the sole and exclusive remedy of employee benefit plans to collect such delinquent amounts.

The Court of Appeal was controlled by *Carpenters v. El Capitan Development Co.* (1991) 53 Cal.3d 1041, 1054, 282 Cal.Rptr. 277, 284, *cert. den.* ____ U.S. ____, 112 S.Ct. 430, which declared void a state mechanic's lien statute [state laws "may not be used to supplement or supplant the civil enforcement scheme developed by ERISA"]. In so ruling, the California Supreme Court relied almost solely upon decisions of this Court interpreting the preemptive intent of Congress in 1974 when ERISA was made the exclusive body of law regulating the administration of employee benefit plans. The California court implicitly ruled (erroneously) in *El Capitan* that ERISA as enacted in 1974 contained a federal cause of action for delinquent employer contributions and, further:

> "With the addition of § 515 of ERISA (29 U.S.C. § 1145) in 1980, Congress sought only to streamline the process of collecting delinquent contributions exclusively under federal law." *Id.*, 53 Cal.3d at 1053, 282 Cal.Rptr. at 283, note 8.

Finally, the California Supreme Court dismissed the 1980 legislative history of § 515 of ERISA relied upon in *Sasso v. Vachris* as unpersuasive and, on that basis, declined to "vitiate the extensive legislative history of ERISA and the numerous United States Supreme Court statements regarding Congress, choice of certain enforcement provisions and the exclusion of all others." 53 Cal.3d at 1053, 282 Cal.Rptr. at 284, note 9.

Some courts have held certain state laws to be preempted by ERISA under the rule that "any state law which singles out ERISA plans, by express reference, for special treatment is preempted," even though that rule, as with all other pronouncements by this Court on ERISA preemption, was announced in *Mackey v. Lanier Collection Agency, supra*, a case arising under the 1974 federal statute involving state law claims against an employee benefit plan, rather than

state law claims by employee benefit plans against employers or third parties after the 1980 amendments to ERISA. In *Sturgis v. Herman Miller, Inc.* (9th Cir. 1991) 943 F.2d 1127, the Ninth Circuit considered the same state mechanic's lien statute as was involved in *El Capitan* and held the statute to be preempted under the rule of *Mackey* quoted above. Similar results were reached in *Chesnut-Adams Ltd. Partnership v. Bricklayers & Masons Trust Funds of Boston* (Mass. 1993) 415 Mass. 87, 612 N.E. 2d 236; *McCoy v. Massachusetts Institute of Technology* (1st Cir. 1991) 950 F.2d 13, *cert. denied* ____ U.S. ____, 112 S.Ct. 1939, 118 L.Ed. 2d 545; and *Bricklayers Local 33 Benefit Funds v. America's Marble Source, Inc.* (3d Cir. 1991) 950 F.2d 114. See, also, *Williams v. Ashland Engineering Co., Inc.* (1st Cir. 1995) 45 F.3d 588, 591 [state statute requiring surety bond on public works projects to cover employer contributions to employee benefit plans *held* preempted, and plans' state law action to enforce bond fails].

Other courts, including the Court of Appeal below, have swung the ERISA preemption scythe in a much wider arc, cutting down generic statutes written to aid all persons; the preemptive effect occurs whenever an employee benefit plan seeks to rely upon any state law as a basis for recovering delinquent employer contributions from any party. In *Ironworkers Midsouth Pension Fund v. Terotechnology Corp.* (5th Cir. 1990) 891 F.2d 548, *rehearing denied*, 896 F.2d 549 (en banc) *cert. denied*, 497 U.S. 1024, 110 S.Ct. 3272, 111 L.Ed.2d 782, the Fifth Circuit nullified a mechanic's lien statute which enabled employee benefit plans to collect delinquent contributions as an impermissible attempt "to supplement the exclusive civil remedies provided by ERISA." *Id.* at 555. More recently, the Ninth Circuit adopted the "exclusive remedy" reasoning of *El Capitan* and *Terotechnology* to nullify the use by employee benefit plans of California Civil Code 1559, a completely generic third party

beneficiary statute enacted in 1872. *Carpenters Health & Welfare Trust Fund v. Tri Capital Corp.* (9th Cir. 1994) 25 F.3d 849 *cert. denied* ____ U.S. ____, 115 S.Ct. 580 [defendant contractor "is analogous to . . . surety" rather than employer, so cannot be sued in ERISA action, but cannot be sued as surety because state statute authorizing actions by third party beneficiaries cannot supplement the ERISA remedy against the delinquent employer only].

In summary, the decisions of the courts of New York, Indiana, Wisconsin and the Third Circuit are in conflict with the California court below, the Massachusetts court, and the First, Fifth and Ninth Circuits.

III.

ASCERTAINING THE SPECIFIC INTENT OF CONGRESS IN 1980 IS THE TOUCHSTONE FOR DEFINING THE PREEMPTIVE SCOPE OF ERISA WITH RESPECT TO STATE LAW REMEDIES AVAILABLE FOR COLLECTING AMOUNTS OWED TO EMPLOYEE BENEFIT PLANS FROM THIRD PARTIES OTHER THAN EMPLOYERS.

Since the 1974 ERISA legislation did not deal with employer delinquencies, the preemptive intent of Congress in 1974 has little or no relevance to the issue presented in this petition. Indeed, the use of this Court's decisions on preemption issues arising under the 1974 enactment has been largely counterproductive in the lower courts when the critical question is actually the preemptive intent of the 1980 amendments to ERISA.

> "In deciding whether a federal law preempts a state statute, our task is to ascertain Congress' intent in enacting the federal statute at issue." *Metropolitan Life*

Ins. Co. v. Massachusetts (1985) 471 U.S. 724, 738, 105 S.Ct. 2380, 2388, 85 L.Ed.2d 728.

The threshold error made by some courts has been to assume that "the federal statute at issue" is ERISA as enacted in 1974, which included the preemption clause of § 514(a).

The essential point to be recognized is that neither ERISA nor § 514(a) would raise a preemption issue in this case if § 515 of ERISA had not been added by the amendments of 1980. Thus, "the federal statute at issue" must first be identified as § 515, enacted in 1980, which was Congress' first effort to deal with the problems of collecting employer delinquent contributions through ERISA.

No decision of this Court has yet covered this vital ground, and the present disarray in the treatment of employer benefit plans in the lower courts is the undeniable consequence. For example, in California, employee benefit plans are no longer permitted to collect delinquent amounts by enforcing mechanic's liens against private property, stop notices against public projects, contractor license bonds and contractor payment and performance surety bonds. Meanwhile, in New York, Indiana, Wisconsin and the Third Circuit, employee benefit plans suffer no such losses and continue enforcing long standing rights under state law with no conflicting effects under the federal statutory scheme.

IV.

THE TIME IS RIPE FOR THIS COURT TO DETERMINE WHETHER EMPLOYEE BENEFIT PLANS MAY USE STATE LAW TO COLLECT DELINQUENT AMOUNTS OWED TO THE PLANS FROM THIRD PARTIES.

Whether the existing status of sharply conflicting decisions among the courts is viewed as a helpful winnowing of

arguments and reasoning, or as a disruptive and destructive evisceration of important economic rights of workers, the fact is that fifteen years have passed since the 1980 amendments added § 515 to ERISA. Indeed, ten years have passed since the publication of the well reasoned analysis of this important issue by the Court of Appeals of New York in *Sasso v. Vachris, supra.* During that time, this Court has reviewed and decided numerous cases involving the preemptive intent of ERISA with respect to state laws affecting claims against employee benefit plans. But still to this date, the Court has accepted review of no case involving ERISA's preemptive intent with respect to state law remedies available to employee benefit plans as they seek to perform their fiduciary duties to recover monies owed to the plans from third parties other than employers.

In the absence of direct guidance by this Court, the misuse of reasoning developed under the 1974 enactment of ERISA has led to the court decision below invalidating a generic third party beneficiary state statute. By that decision, an employee benefit plan cannot sue to enforce a private surety bond issued by an insurance company to assure payment of the employer's obligations.

Such a result, by all appearances, seems squarely at odds with the expressed intent of Congress in 1980, which was to make collection of delinquent employer contributions more efficacious, 126 Cong.Rec. S11673, without changing any other type of remedy permitted under state or federal law with respect to delinquent multiemployer contributions. 126 Cong.Rec. at 20202. The legislative history of ERISA contains no evidence of an intent by Congress to grant employee benefit plans a federal cause of action against the employer under ERISA in exchange for nullification of all state law rights and remedies against the employer and all third parties.

While this question of preemptive intent remains undecided by this Court, employee benefit plans in California and other states are incurring substantial monetary losses through nullification of rights and remedies previously enjoyed under state law, and still enjoyed under state law in New York, Indiana, Wisconsin and now, thanks to the Third Circuit, in Pennsylvania.

CONCLUSION

Based on the foregoing, the petition should be granted.

DATED: September 29, 1995

Respectfully submitted,

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APPENDIX

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION THREE

OPERATING ENGINEERS PENSION TRUST, et al.,
Plaintiffs and Appellants,

vs.

INSURANCE COMPANY OF THE WEST,
Defendant and Respondent.

2d Civil No. B077217
(Super. Ct. No. BC 52093)

Court of Appeal - Second District
Filed
May 25, 1995
Joseph A. Lane, Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard C. Neal, Judge. Affirmed.

Jett & Laquer and Wayne Jett, for Plaintiffs and Appellants.

Potter & Taylor and William R. Potter, for Defendant and Respondent.

Plaintiffs and appellants Operating Engineers Pension Trust, Operating Engineers Health and Welfare Fund, Operating Engineers Vacation-Holiday Savings Trust and Operating Engineers Training Trust (the Trusts) appeal a judgment following a grant of summary judgment in favor of

defendant and respondent Insurance Company of the West (West).

The Trusts seek to collect on certain payment and performance bonds to recover unpaid fringe benefit contributions, based on the theory they are third-party beneficiaries of the bonds. The issue presented is whether this state law claim by the Trusts is barred by the Employee Retirement Income Security Act of 1974 (ERISA). (29 U.S.C. § 1001 et seq.)

We conclude the Trusts' third-party beneficiary claim (Civ. Code, § 1559) is preempted because it supplements the remedy provided by ERISA. (*Carpenters Health & Welfare Tr. F.* v. *Tri Capital* (hereafter *Tri Capital*) (9th Cir. 1994) 25 F.3d 849, 853-854, cert. den.) The judgment therefore is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

The Trusts are express trusts created to receive employer contributions under written collective bargaining agreements among the International Union of Operating Engineers, Local Union No. 12 (the Union) and certain employer associations in the construction industry in Southern California.

West issued various payment and performance bonds in connection with construction projects, both public and private, upon which Wm. Kirchavny Construction, Inc. (Kirchavny) was the general contractor.[1] Kirchavny's collective bargaining agreement with the Union required Kirchavny to make fringe benefit payments to the Trusts based on each hour worked by the employees. Kirchavny failed to make required payments and became insolvent.

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[1] Kirchavny is not a party to this appeal.

On March 31, 1992, the Trusts initiated a complaint against West to collect on the bonds the amounts due, to which West filed a general denial. West pled numerous affirmative defenses including ERISA preemption.

The Trusts then moved for summary judgment to recover $28,077.39 in unpaid contributions. The Trusts contended they were entitled "to make claims as [third-party] beneficiaries of Kirchavny's construction bonds," and the remedy of recovery on the bonds was not preempted by ERISA.

On June 7, 1993, the trial court denied the Trusts' motion and instead, granted summary judgment in favor of West, ruling the claims were preempted by ERISA.

The Trusts appealed.

CONTENTIONS

The essence of the Trusts' argument is that their action to recover on the subject payment and performance bonds as third-party beneficiaries thereof is not preempted by ERISA.

DISCUSSION

1. *Overview of ERISA preemption.*

a. *General principles.*

ERISA is a comprehensive federal statutory scheme designed to promote the interests of employees and their beneficiaries in employee benefit plans. (*Carpenters So. Cal. Admin. Corp.* v. *El Capitan Development Co.* (hereafter, *El Capitan*) (1991) 53 Cal.3d 1041, 1047, cert. den.)

ERISA's preemption clause, section 514(a), provides: "[T]he provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit

plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title." (29 U.S.C. § 1144(a).)

ERISA defines the terms used in its preemption provision as follows: "(1) The term 'State Law' includes all *laws, decisions, rules, regulations*, or other State action having the effect of law, of any State.... [¶] (2) The term 'State' includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." (29 U.S.C. § 1144(c), italics added.)

The United States Supreme Court has recognized ERISA preemption is " 'conspicuous for its breadth,' " and that its "deliberately expansive language was designed to establish pension plan regulation as exclusively a federal concern." (*Ingersoll-Rand Co.* v. *McClendon* (1990) 498 U.S. 133, 138 [112 L.Ed.2d 474], internal quotation marks omitted.) A law relates to an employee benefit plan " 'if it has a connection with or reference to' " such a plan. (*Id.*, at p. 139.) A state law may " 'relate to' " a benefit plan, and thereby be preempted, even if the law is not specifically designed to affect such plans, or if the effect is only indirect. (*Ibid.*)

b. *Survey of California state remedies which have been held to be preempted.*

To guide us in the determination of whether the Trusts' third-party beneficiary claim is preempted by ERISA, we examine case law concerning ERISA preemption of various California remedies.

(1) *Mechanics' lien remedy under California Civil Code section 3111 to recover delinquent contributions preempted by ERISA.*

In *El Capitan*, a construction subcontractor failed to make fringe benefit contributions to various multiemployer trust funds in accordance with a collective bargaining agreement. The trust fund administrator recorded mechanics' liens on the real property pursuant to Civil Code section 3111 to collect the delinquent contributions and it later sued to foreclose on the liens. (*El Capitan*, *supra*, 53 Cal.3d at pp. 1045-1046.)[2]

The California Supreme Court held Civil Code section 3111 is preempted by ERISA because the statute "specifically purports to regulate employee benefit plans by providing an additional method of funding, a lien against real property, which is not provided by, and therefore is not allowed under, ERISA. In essence, section 3111 creates a new state cause of action for the collection of contributions owed to benefit plans and makes an additional entity liable for such contributions." (*El Capitan*, *supra*, 53 Cal.3d at p. 1052.)

El Capitan explained ERISA preempts new state law causes of action for the collection of contributions because, consistent with its goal of providing appropriate sanctions and ready access to federal courts (29 U.S.C. § 1001(b)), ERISA itself provides the remedies for the collection of contributions. (*El Capitan, supra*, 53 Cal.3d at p. 1052.)

Section 502(a) of ERISA, 29 United States Code section 1132(a)(3), states "[a] civil action may be brought — . . . [¶] (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of

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[2]Civil Code section 3111 provides: "For the purposes of this chapter, an express trust fund established pursuant to a collective bargaining agreement to which payments are required to be made on account of fringe benefits supplemental to a wage agreement for the benefit of a claimant on particular real property shall have a lien on such property in the amount of the supplemental fringe benefit payments owing to it pursuant to the collective bargaining agreement."

this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." (See *El Capitan, supra*, 53 Cal.3d at p. 1052.)

Further, section 515 of ERISA, 29 United States Code section 1145, pertaining to delinquent contributions provides: "Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such an agreement." Therefore, a participant, beneficiary or fiduciary can bring an action under section 502(a) of ERISA (29 U.S.C. § 1132(a)) to enforce an employer's obligations under section 515 of ERISA (29 U.S.C. § 1145). (*El Capitan, supra*, 53 Cal.3d at pp. 1052-1053.)

El Capitan found the mechanics' lien action under Civil Code section 3111 was, in effect, a civil action by a fiduciary to enforce the provisions of ERISA with regard to employer contributions and to enforce the terms of the plan, i.e., the funding contributions required by the collective bargaining agreement. (*El Capitan, supra*, 53 Cal.3d at p. 1054.) The action was barred because state laws "may not be used to supplement or supplant the civil enforcement scheme developed by ERISA." (*Ibid.*)

(2) *California stop notice remedy also preempted.*

California's stop notice statutes,[3] as they pertain to trust funds established pursuant to collective bargaining agreements, also are preempted by ERISA. (*Carpenters Health*

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[3]The stop notice procedures set forth in Civil Code section 3156 et seq. apply to private works while those found at Civil Code section 3179 et seq. apply to public works. Upon receipt of a stop notice, the owner or

& Welfare Trust Fund v. Developers Ins. Co. (hereafter, *Developers Ins.*) (1992) 11 Cal.App.4th 1539, 1545-1547, rev. den., cert. den.; *Tri Capital, supra*, 25 F.3d at pp. 853-854, fn. 5.)

In *Tri Capital*, the Ninth Circuit held the trust funds were barred from utilizing the California stop notice remedy to enforce the terms of a plan. It reasoned "the California statute supplements a remedy already provided by ERISA: civil suits under 29 U.S.C. § 1132(a)(3) to enforce plans' rights to contributions under 29 U.S.C. § 1145." (*Tri Capital, supra*, 25 F.3d at p. 854.)

Developers Ins., similarly concluded, "the stop notice procedure, like the lien procedure [of Civil Code section 3111], regulates ERISA plans by creating a funding mechanism not provided by Congress (i.e., a hold on construction loan moneys). It creates a new state cause of action for the collection of contributions owed to benefit plans and makes an additional entity liable for such contributions." (*Developers Ins., supra*, 11 Cal.App.4th at p. 1546.)

(3) *Action on contractor's bond under California Business and Professions Code section 7071.5 also preempted.*

Business and Professions Code section 7071.5, provides the bond required to be maintained by a licensed contractor shall be for the benefit of, inter alia, "[a]ny express trust fund, . . . damaged as the result of the licensee's failure to pay fringe benefits for eligible employees represented by the union which is signatory to the collective-bargaining agreement." (Bus. & Prof. Code, § 7071.5, subd. (d).)

This provision for the enforcement of fringe benefit contributions similarly has been held to be preempted "because

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public entity has a duty to withhold certain funds from the contractor. (Civ. Code, §§ 3161, 3186.)

ERISA provides its own collection mechanisms." (*Carpenters Health & Welfare Trust Fund v. Surety Co.* (1993) 13 Cal.App.4th 1406, 1411.)

(4) *Third-party beneficiary claim under Civil Code section 1559 to enforce rights of trust funds likewise preempted.*[4]

In *Tri Capital*, which is directly on point, the Ninth Circuit examined whether ERISA preempts an attempt under a third-party beneficiary theory to enforce a plan's right to collect delinquent fringe benefit contributions.

In *Tri Capital*, multiemployer benefit plans brought an action against the construction lender and general contractor, seeking recovery of the subcontractors' unpaid plan contributions. (*Tri Capital, supra*, 25 F.3d at p. 851.) The subcontract between the general contractor and the subcontractor provided " '[l]abor benefits will be paid under a joint check agreement between [the general contractor, the subcontractor] & the appropriate agency.' " (*Id.*, at p. 854.) The trust funds' complaint alleged a claim under Civil Code section 1559 seeking to enforce the rights of the trust funds as third-party beneficiaries of the subcontract.

Tri Capital held the trust funds were "attempting to use the California third-party beneficiary statute to enforce the terms of a plan, and [Civ. Code, § 1559] merely supplements the ERISA remedy noted above [i.e., civil suits under 29 U.S.C. § 1132(a)(3) to enforce plans' rights to contributions under 29 U.S.C. § 1145]. Therefore, the state third-party beneficiary remedy is preempted by ERISA." (*Tri Capital, supra*, 25 F.3d at p. 854.)

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[4]Civil Code section 1559 states "[a] contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

(5) *Summary.*

In sum, ERISA has been held to preempt actions to recover delinquent fringe benefit contributions based on California's mechanics' lien procedure (Civ. Code, § 3111), the stop notice remedy (Civ. Code, §§ 3156 et seq., 3179 et seq.), a licensed contractor's bond (Bus. & Prof. Code, § 7071.5, subd. (d), and a third-party beneficiary theory (Civ. Code, § 1559).

Guided by these ample authorities, we advert to the issue raised by the instant case.

2. *Action by the Trusts to collect on payment and performance bonds as third-party beneficiaries preempted by ERISA.*

According to the Trusts, they "have sued to enforce private contract claims as third party beneficiaries of payment and performance bonds issued by [West] as a private surety." They contend ERISA preempts state laws, not private contracts, and West should be bound by the private contractual obligations it undertook when it issued the bonds.

Even assuming the Trusts are intended beneficiaries (Civ. Code, § 1559), their effort to recover thereon as third-party beneficiaries is unavailing. In *Tri Capital*, as here, the trust funds were seeking to enforce their alleged contractual rights as third-party beneficiaries of a private contract. (*Tri Capital, supra*, 25 F.3d at p. 854.) *Tri Capital* held the claim to enforce the terms of a plan under a third-party beneficiary theory was barred by ERISA because Civil Code section 1559 "merely supplements" the remedy available under ERISA. (*Ibid.*)

Accordingly, the fact the Trusts' claim in the instant case is based on private contracts, i.e., the bonds, does not enable

the Trusts to avoid ERISA preemption of this action to collect delinquent plan contributions.[5]

3. Remaining arguments unavailing.

The fact a third-party beneficiary claim may provide an effective and necessary remedy for employee benefit plans is irrelevant. Even state laws which may advance ERISA's underlying purposes are preempted if they fall within ERISA's sphere. (*Mackey v. Lanier Collections Agency & Serv.* (1988) 486 U.S. 825, 829-830 [100 L.Ed.2d 836]; *El Capitan, supra*, 53 Cal.3d at p. 1056.)

The Trusts also argue at length that as enacted in 1974, ERISA afforded no right of action against an employer for recovery of delinquent contributions, that such right did not exist until ERISA was amended in 1980, and Congress could not have intended to preempt state law causes of action when it adopted the preemption provision in 1974, or when it amended ERISA in 1980.

The contention does not detain us. The *El Capitan* majority reviewed the pertinent legislative history and rejected this very argument. (*El Capitan, supra*, 53 Cal.3d at p. 1053, fn. 8, see diss. opn. of Broussard, J., at pp. 1059-1060, 1067-1068.) *El Capitan's* determination is binding on this count. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

El Capitan explained that "[e]ven in 1974 ERISA contained a cause of action to enforce its terms, section 502 (29 U.S.C. § 1132), and the remedies provided in section 502 of

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[5]While recognizing that different state statutes were involved, similar attempts to recover on other types of bonds, namely, a stop notice release bond and a licensed contractor's bond, have been rejected on ERISA grounds. (*Developers Ins., supra*, 11 Cal.App.4th at pp. 1542, 1545-1547; *Carpenters Health & Welfare Trust Fund, supra*, 13 Cal.App.4th at pp. 1408-1409, 1411.)

ERISA are *exclusive*. With the addition of section 515 of ERISA (29 U.S.C. § 1145) in 1980, Congress sought only to streamline the process of collecting delinquent contributions *exclusively* under federal law." (*El Capitan, supra*, 53 Cal.3d at p. 1053, fn. 8, italics added.)

The Trusts also argue that irrespective of ERISA preemption of their California statutory remedies, they are entitled to proceed against West on common law theories. The contention is meritless because ERISA's preemption provision applies to decisional as well as statutory state law. (29 U.S.C. § 1144, subd. (c)(1).)

It is unnecessary to address the Trusts' remaining arguments.[6]

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[6]The Trusts brought the instant state action because they apparently lack an effective remedy under ERISA in these circumstances. The absence of a federal remedy, coupled with ERISA's preemption of state remedies, places the Trusts in what has been described as a regulatory vacuum. (See Widiss & Gostin, *What's Wrong with the ERISA "Vacuum"?: The Case Against Unrestricted Freedom for Employers to Terminate Employee Health Care Plans and to Decide What Coverage is to be Provided When Risk Retention Plans are Established for Health Care* (1992) 41 Drake L.Rev. 635, 640; Martin, *ERISA, the Law That Ate Health Care Reform* (May 1993) Cal.Law. 40, 42; see also *United Wire, etc. v. Morristown Mem. Hosp.* (3d Cir. 1993) 995 F.2d 1179, 1197, diss. opn. of Nygaard, J. ["without some limits [ERISA's preemption clause] could become a legal [black hole] with an attractive force no state law could resist."].)

DISPOSITION

The judgment is affirmed. Each party to bear respective costs on appeal.

CERTIFIED FOR PUBLICATION

KLEIN, P.J.

We concur:

CROSKEY, J.

KITCHING, J.

Second Appellate District, Division Three, No. B077217
S047335

IN THE SUPREME COURT OF CALIFORNIA

OPERATING ENGINEERS PENSION TRUST et al.,
Appellants

v.

INSURANCE COMPANY OF THE WEST,
Respondent

SUPREME COURT FILED
August 9, 1995
Robert Wandruff, Clerk

Appellants' petition for review DENIED.

Mosk, J. is of the opinion the petition should be granted.

/s/ LUCAS
Chief Justice

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

OPERATING ENGINEERS PENSION TRUST, et al.,
Plaintiffs,

vs.

INSURANCE COMPANY OF THE WEST,
Defendant.

Case No. BC 052 093

ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT

Date: June 7, 1993

Department: 22

Original Filed
June 7, 1993
County Clerk

Plaintiff is the trust for a pension fund for the Operating Engineers Union. Defendant issued performance bonds guaranteeing the work of a firm called Kirchnavy Construction on five public works projects and one private project. Kirchnavy's collective bargaining agreement with the Operating Engineers required Kirchnavy to make fringe benefits payments to the plaintiff. This action seeks to recover from defendant some $28,077 of such payments which Kirchnavy owes plaintiff but has failed to pay.

Plaintiff moves for summary judgment, or in the alternative summary adjudication that the claims asserted in this action **are not** preempted under ERISA, the comprehensive federal law governing pension plans.

The controlling authority appears in *Carpenter's Southern California Administrative Corporation v. El Capitan Development Company*, (1991), 53 C3d 1041, *cert. denied*, 112 S. Ct. 430. In that closely similar case a union pension trust sought to exercise state law rights, created under Civil Code 3111, authorizing a union pension trust to impose a lien (similar to a mechanics lien) on property where work was performed and to foreclose that lien to compel payment. The Court first noted that:

> "Section 514(a) of ERISA expressly preempts 'any and all state laws insofar as they may now or hereafter **relate** to any employee benefit plan . . . (29 USC 1144(a), italics added) Section 514(c) of ERISA defines the terms used in section 514(a): 'The term "State Law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State . . .'" *Id.*, at 1047.

The court went on to find that Civil Code Section 3111 relates to employee benefit plans, and thus the plaintiff's action under that section was preempted:

> "Section 3111 specifically purports to regulate employee benefit plans by providing an additional method of funding, a lien against the property, which is not provided by, and therefore is not allowed under, ERISA. In essence, section 3111 creates a new state cause of action for the collection of contributions owed to benefit plans and makes an additional entity liable for such contributions . . ."
>
> "ERISA preempts new state-law causes of action for the collection of contributions because, consistent with its goal of providing 'appropriate sanctions and ready access to federal courts' (29 USC Section 1001(b), ERISA itself provides the remedies for the collection of contributions." *Id.*, at 1052.

Under identical reasoning the claims brought in the present action are barred by ERISA. Plaintiff seeks to assert a state law cause of action, for purposes of collecting contributions, thus pursuing a method for collecting pension contributions not provided under ERISA, from an entity not made liable under ERISA.

Plaintiff argues that the claims here are distinguishable from those in *Carpenter's,* because the stop notice/ foreclosure remedy there involved was created by statute, where the rights asserted here are private contractual rights. This contention is unavailing.

First, the bonds involved here do in fact appear to be required by statute. CC 3247 **requires** a payment bond on public works projects. CC 3248 requires that such bond inure to the benefit of persons named in CC 3181, which in turn incorporates the persons names in CC 3110, 3111 and 3112. CC 3111 identifies a trust fund under a collective bargaining agreement. It is by this chain of statutory references that plaintiff came to be the beneficiary on the bonds, and its rights are thus very much a creation of state statute.

Second, even if plaintiff's asserted rights were purely private, in the sense that they arose only under a private contract, and plaintiff was merely seeking to enforce those rights through a common law cause of action in this court, ERISA would still preempt the claim. Plaintiff would still be seeking to use a state law cause of action to give a remedy for pension plan funding other than the exclusive mechanisms provided under ERISA. See *Olson v. General Dynamics,* (9 Cir 1991), 960 F 2d 1418.

In *Olson,* plaintiff claimed he was promised as part of the inducements to shift employment from one firm to another that his pension benefits would not be diminished. He brought suit in state court for fraud when it turned out to the contrary. The court held that this state common law claim

was preempted. Judge Reinhardt, in a dissent which was candid about the Judge's unhappiness with the result, summarized the rule as follows:

> "Even if the defendants defrauded Olson and induced him to accept employment by falsely representing that he would receive pension benefits equal to those he previously enjoyed, Olson may not assert the state cause of action he would have been entitled to plead prior to the enactment of ERISA." *Id.*, at 1423.

Thus state law claims "related to" ERISA in the relevant sense are barred even if they arise out of private promises rather than state statutory law.

In accordance with the foregoing, the court finds that plaintiff's claims are preempted by federal law, that this court lacks subject matter jurisdiction, and that the complaint should be dismissed. IT IS SO ORDERED.

The Clerk is directed to mail this order to counsel.

RICHARD C. NEAL

Richard C. Neal
SUPERIOR COURT JUDGE

DATED: June 7, 1993

APPENDIX

Constitution and Statutes Involved

I. Constitution of the United States, Article VI, Clause 2. Supreme Law of the Land

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

II. ERISA, Section 514(a) and (c), 29 U.S.C. § 1144(a), (c), 88 Stat. 897.

"Sec. 514. (a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975. . . .

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. . . .

(2) The term "State" includes a State, any political subdivision thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title."

III. ERISA, Section 515, 29 U.S.C. § 1145, 94 Stat. 1295.

"Sec. 515. Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement."

IV. California Civil Code, Section 1559.

"Sec. 1559. Enforcement by third party beneficiary *When Contract For Benefit of Third Person May Be Enforced.* A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." (Enacted 1872.)

(2)

Supreme Court, U.S.
FILED
NOV 8 1995
CLERK

No. 95-603

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1995

OPERATING ENGINEERS PENSION TRUST, OPERATING ENGINEERS HEALTH & WELFARE FUND, OPERATING ENGINEERS VACATION-HOLIDAY SAVINGS TRUST, AND OPERATING ENGINEERS TRAINING TRUST,
Petitioners,

vs.

INSURANCE COMPANY OF THE WEST,
Respondent.

On Petition For Writ Of Certiorari To The Court of Appeal, Second Appellate District, Division Three, Of The State Of California

RESPONDENT'S BRIEF IN OPPOSITION

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Question Presented

Whether an action created by state law that allowed a claim for plan contributions to be filed against a third party surety, on a bond that did not name Petitioner as a beneficiary, has been pre-empted by ERISA?

There are no parent or nonwholly owned subsidiaries of Respondent.

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No. 95-603

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

OPERATING ENGINEERS PENSION TRUST, OPERATING ENGINEERS HEALTH & WELFARE FUND, OPERATING ENGINEERS VACATION-HOLIDAY SAVINGS TRUST, AND OPERATING ENGINEERS TRAINING TRUST,
Petitioners,
vs.
INSURANCE COMPANY OF THE WEST,
Respondent.

On Petition For Writ Of Certiorari To The Court of Appeal, Second Appellate District, Division Three, Of The State Of California

RESPONDENT'S BRIEF IN OPPOSITION

To the Honorable Justices of the Supreme Court

Respondent respectfully requests the Court deny the Petition for Writ of Certiorari to review the decision of the Court of Appeal of the State of California filed May 25, 1995, reproduced in the Appendix to the Petition.

Summary of Argument

No issues raised by this case warrant further consideration by this Court. This Court has previously examined the legislative history of and ruled upon the extent of the pre-emption clause of ERISA in several opinions, and has concluded that the Congress intended the pre-emption language to be deliberately expansive, and to establish pension plan regulation as exclusively a federal concern, with a uniform body of law.

The decision of the Court below is consistent with decisions of the United States Court of Appeal, Ninth Circuit, and the California Supreme Court in cases where this Court denied previous petitions for writs of certiorari.

The Petitioners are not even within the class of third party beneficiaries identified by the bonds in question who could assert a claim on these bonds. Only through application of a special provision in California law that allowed union-sponsored employee benefit plans to assert claims on these bonds could Petitioners maintain such claims. The California Supreme Court held such provisions have been pre-empted by ERISA and this Court denied a petition for a writ of certiorari.

The Petitioners now seek to avoid the result of those cases by claiming that they are the intended beneficiaries of the bonds and applying another California statute that would give them rights against the third party surety.

The right given by state law to collect contributions from third party sureties was unique to union-sponsored plans for the construction trades. No other employee benefit plans enjoyed such rights, nor were such rights available to union plans in all states. The pre-emption of such state-created causes

of action is consistent with the purpose of ERISA to create a uniform body of law.

I. This Court's Published Decisions Adequately Address the Pre-Emption Issue.

This Court has said of the pre-emption clause in § 514(a) of ERISA [29 U.S.C. § 1144(a)] that "the express pre-emption provisions of ERISA are deliberately expansive, and designed to 'establish pension plan regulations as exclusively a federal concern.'" *Pilot Life Insurance Co. vs. Dedeaux*, 481 U.S. 41, 45 (1986). The Court noted the "expansive sweep of the pre-emption clause" (*Id.* at p. 47) and "emphasized that the pre-emption clause is not limited to 'state laws specifically designed to affect employee benefit plans.'" (*Id.* at p. 47-48). Common law causes of action that "relate to" employee benefit plans are expressly pre-empted. (*Id.* at p. 47, 48) [Citing *Shaw vs. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), and *Metropolitan Life Ins. Co. vs. Massachusetts*, 471 U.S. 724 (1985).]

II. The "Conflicting Decisions" Cited by Petitioner Are Distinguishable or Invalidated by This Court's Published Opinions.

It is not necessary for this Court to review this case based on the illusory conflicts raised by Petitioner. The cases cited by Petitioner can be limited to their facts, are distinguishable, and their failure to follow this Court's analysis is readily apparent.

Sasso vs. Vachris, 66 N.Y.2d 28 (1985), is cited by Petitioner as an example of a conflicting decision. This conflict is more illusory that real. *Sasso* was decided in 1985, before this Court had explained that pre-emption was not limited to state laws specifically designed to affect employee benefit plans,

and that state laws "relate to" a benefit plan and are pre-empted if they have a connection with or reference to a plan. *Pilot Life Ins. Co. vs. Dedeaux*, 481 U.S. 41 (1987). Under the broad common sense meaning, a state law may "relate to" a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect. *Ingersoll-Rand Co. vs. McClendon*, 498 U.S. 133, 140 (1990).

Sasso was disregarded by the Federal Court in *Romney vs. Lin*, 894 F.Supp. 163 (DC, So. Dist. N.Y. 1995). The District Court observed that *Sasso* was based on the reasoning in *Renaldo vs. Cuomo*, 79 F.2d 133 (2d Cir. 1984), which was rejected by this Court in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990). The District Court concluded that N.Y. Bus. Corp. Law § 630 was pre-empted. This is the same statute that *Sasso* held was not pre-empted.

Sasso was criticized in *Local Union 598, etc. vs. J.A. Jones Const. Co.*, 846 F.2d 1213, 1219 fn.8 (9th Cir. Wash. 1988).

Petitioners also cite *Ragan vs. Tri-County Excavating, Inc.*, 62 F.3d 501 (3rd Cir. Pa. 1995) as a conflicting decision. This decision is also based upon the notion that a law "relates to" an employee benefit plan only "if it is specifically designed to affect employee benefit plans, if it singles out such plans for special treatment, or if the rights or restrictions it creates are predicated on the existence of such a plan." *Ragan, supra*, 63 F.3d at 510-511, citing its own prior opinion in *United Wire, Metal and Machine Health and Welfare Fund vs. Morristown Memorial Hospital*, 995 F.2d 1179, 1192 (3d Cir. N.J. 1993), cert. denied _____ U.S. _____, 114 S.Ct. 382, 126 L.Ed.2d 332 (1993).

The Third Circuit "assumes" that the union "is proceeding at common law as third-party beneficiary of the surety bond." *Ragan*, *supra*, 62 F.3d at 511. Since the terms of the bond are not quoted in the opinion, it is unclear how the union became a third party beneficiary. It is apparent that the bonds were for private works and apparently there were no statutory requirements. If the bond in question specifically named the union or its trust fund as a beneficiary without resort to state law, then the case is factually different from this case. Here, the Petitioners are not parties to the bonds, and will have no claim in them in the absence of some state law creating such a cause of action especially for a union administered employee benefit plan.

The Third Circuit ignores all those portions of this Court's decisions in *Pilot Life*, *supra*, and *Ingersoll-Rand*, *supra*, that emphasize the breadth of the pre-emption clause of ERISA and the "broad common-sense meaning" of the phrase "relate to," as used in ERISA § 514(a).

III. The Petitioning Union Trust Funds Can Not Maintain An Action Against The Third Party Surety Without Invoking Their Special Status As Employee Benefit Plans.

Union employee benefit plans were given special status by California law as claimants able to file mechanic's liens, stop notices, and bond claims on construction projects. California Civil Code § 3111. This statute was held pre-empted in *Carpenters So. Cal. Admin. Corp. vs. El Capitan Development Co.*, 53 Cal.3d 1041 (1991), cert. denied 502 U.S. 963 (1991).

The union employee plans described in § 3111 were granted rights on private construction bonds by § 3226 which

specifically granted "those persons described in Section 3110, 3111, or 3112" a right to recover on such bonds.

On public works construction projects, bonds were required by statute, § 3247, and were required by § 3248(c) to inure to the benefit persons named in § 3181, which in turn made reference to § 3111, the union plans.

Of the nine bonds that Petitioners included in their action, eight were for public works projects and were therefore required by statute to be provided and were required by statute to inure to the benefit of the union administered employee benefit plans. Contrary to Petitioners' assertion that these are "private surety bonds," (Petition, p. i, Question Presented) these are statutory bonds with statutory requirements that specifically refer to the employee benefit plans in question.

To this extent, this case differs from those cited by Petitioner as being in conflict. In *Sasso*, *supra*, and *Ragan*, *supra*, the courts concluded that no action specific to employee benefit plans had been created. If the Third Circuit applied its three part test of what "relates to" an ERISA plan to the California law, it should reach the same result as the court below.

The one private bond involved was specifically limited to persons designated in § 3110 and § 3112 of the California Civil Code, which excludes Petitioners.

California law does not allow a third party beneficiary to sue on a contract unless the contract is made expressly for his benefit. California Civil Code § 1559. Petitioners can not place themselves within the group for whose benefit the bonds were issued without invoking the statutes that specifically identify the

union benefit plans as additional persons to whom such bonds shall inure.

IV. The Intent of Congress to Create a Uniform Body of Law Would Apply Equally to Laws Effecting Contributions to Plans.

Union-sponsored employee plans in the construction trades appear to be unique in having been given rights to collect plan contributions from third parties other than the employer. The basis for that right varies among the states or may be nonexistent in some states. *See, e.g., Trustees of Elec. Wkrs. H.& W. Trust vs. Marjo Corp.*, 988 F.2d 865 (9th Cir. 1992), where a Nevada statute made the general contractor liable for subcontractors obligations. The Court of Appeal held the statute to have been pre-empted to the extent it applies to ERISA plans. The Court observes that "there seems to be no support for concluding that Congress intended to allow each state to expand liability for contributions to ERISA as it sees fit." *Marjo, supra*, 988 F.2d at 868.

The intent of § 514(a) was to ensure that plans and plan sponsors would be subject to a uniform body of benefits laws. *Ingersoll-Rand Co. vs. McClendon, supra*, 498 U.S. at 142. The continued existence of state laws that provide for plan contribution resources other than those in ERISA, and which vary from state to state and from one profession to another within a state, does not create a uniform body of law. If a uniform body of benefits law is to exist, it must be uniform in all aspects of a plan administration, both as to payment of benefits and collection of contributions.

Conclusion

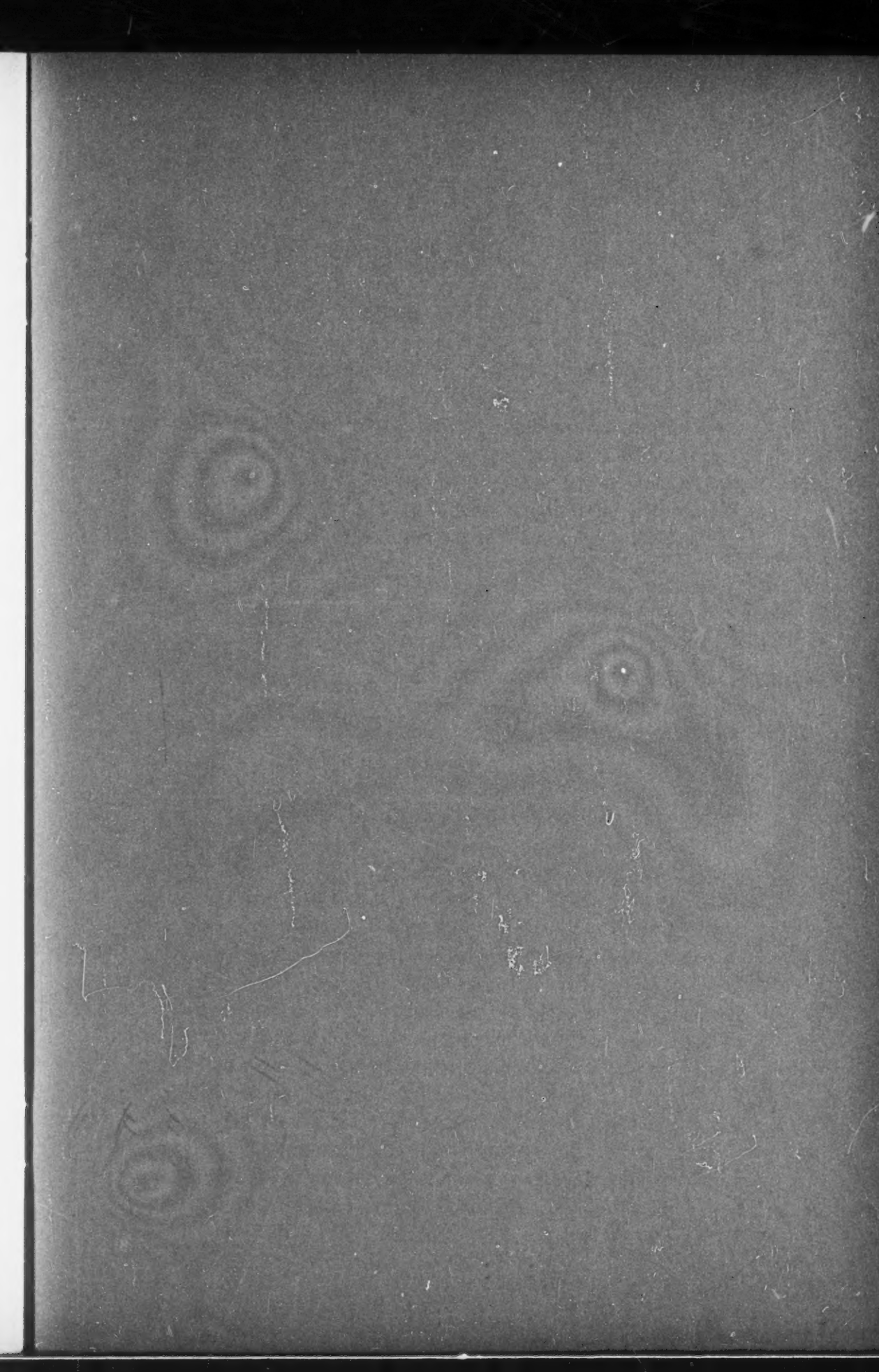
This Court has already expressed its views of the Congressional intent in the pre-emption clause. The fact that Petitioners have a different interpretation of Congressional intent is not a reason for this Court to again visit that issue by granting this petition for a writ of certiorari.

The petition should be dismissed.

Respectfully submitted,

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Dated: November 3, 1995



APPENDIX

Statutes Involved

I. ERISA, Section 514(a), 29 U.S.C. § 1144(a)

Sec. 514. (a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975 ....

II. California Civil Code § 1559

Sec. 1559. Third-party beneficiary contract. A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.

III. California Civil Code § 3110

Sec. 3110. Persons entitled to lien. Mechanics, materialmen, contractors, subcontractors, lessors of equipment, artisans, architects, registered engineers, licensed land surveyors, machinists, builders, teamsters, and draymen, and all persons and laborers of every class performing labor upon or bestowing skill or other necessary services on, or furnishing materials or leasing equipment to be used or consumed in or furnishing appliances, teams, or power contributing to a work of improvement shall have a lien upon the property upon which they have bestowed labor or furnished materials or appliances or leased equipment for the value of such labor done or furnished at the instance of the owner or of any person acting by his authority or under him as a contractor or otherwise. For the

purposes of this chapter, every contractor, subcontractor, sub-subcontractor, architect, builder, or other person having charge of a work of improvement or portion thereof shall be held to be the agent of the owner.

IV. California Civil Code § 3111

Sec. 3111. Payments to express trust fund established pursuant to collective bargaining agreement. For the purposes of this chapter, an express trust fund established pursuant to a collective bargaining agreement to which payments are required to be made on account of fringe benefits supplemental to a wage agreement for the benefit of a claimant on particular real property shall have a lien on such property in the amount of the supplemental fringe benefit payments owing to it pursuant to the collective bargaining agreement.

V. California Civil Code § 3112

Sec. 3112. Site improvement lien. Any claimant who, at the instance or request of the owner (or any other person acting by his authority or under him, as contractor or otherwise) of any lot or tract of land, has made any site improvement has a lien upon such lot or tract of land for work done or materials furnished.

VI. California Civil Code § 3181

Sec. 3181. Persons other than original contractor. Except for an original contractor, any person mentioned in Section 3110, 3111, or 3112, or in Section 4107.7 of the Public Contract Code, or furnishing provisions, provender, or other supplies, may serve a stop notice upon the public entity responsible for the public work in accordance with this chapter.

VII. California Civil Code § 3226

Sec. 3226. Construction of bonds given pursuant to title. Any bond given pursuant to the provisions of this title will be construed most strongly against the surety and in favor of all persons for whose benefit such bond is given, and under no circumstances shall a surety be released from liability to those for whose benefit such bond has been given, by reason of any breach of contract between the owner and original contractor or on the part of any obligee named in such bond, but the sole conditions of recovery shall be that claimant is a person described in Section 3110, 3111, or 3112, and has not been paid the full amount of his claim.

VIII. California Civil Code § 3247

Sec. 3247. Filing of payment bond for public work involving expenditures of over $25,000.

(a) Every original contractor to whom is awarded a contract by a public entity, except as provided in subdivision (d) of Section 7103 of the Public Contract Code, involving an expenditure in excess of twenty-five thousand dollars ($25,000) for any public work shall, before entering upon the performance of the work, file a payment bond with and approved by the officer or public entity by whom the contract was awarded.

A public entity shall state in its call for bids for any such contract that a payment bond is required in the case of such an expenditure.

(b) A payment bond filed and approved in accordance with this section shall be sufficient to enter upon the performance of work under a duly authorized contract which supplements the contract for which such payment bond was

filed, if the requirement of a new bond is waived by the public entity.

(c) For purposes of this section, providers of architectural, engineering, and land surveying services pursuant to a contract with a public entity for any public work shall not be deemed an original contractor and shall not be required to post or file the payment bond required in subdivisions (a) and (b). This subdivision shall apply to all contracts entered into subsequent to January 1, 1971.

The amendment to this section made during the 1980 portion of the 1979-80 Regular Session of the Legislature by Chapter 293 of the Statutes of 1980, does not constitute a change in, but is declaratory of, existing law.

IX. California Civil Code § 3248(c)

Sec. 3248. Payment bond requirements. To be approved the payment bond shall satisfy all of the following requirements:

...

(c) By its terms inure to the benefit of any of the persons named in Section 3181 so as to give a right of action to such persons or their assigns in any suit brought upon the bond.